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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NANCY MARIE BESENTY, Defendant and Appellant.	B275222 (Los Angeles County Super. Ct. No. TA115853)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed and remanded.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Idan Ivri, Deputy Attorney

General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Nancy Marie Besenty guilty in count 1 of the first degree murder of Yesenia Quintanilla (Pen. Code, § 187, subd. (a))[1] and in count 2 of the attempted willful, deliberate, and premeditated murder of Carlos Quintanilla (§§ 664, 187, subd. (a)). As to both counts, the jury also found the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)), and that a principal personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)).

The trial court sentenced Besenty to 50 years to life in prison in count 1, comprised of 25 years to life for murder and 25 years to life for the firearm enhancement. As to count 2, Besenty was sentenced to life in prison, plus a consecutive 25 years to life for the firearm enhancement.

We affirmed the convictions on direct appeal. The Supreme Court denied review. Besenty petitioned for habeas corpus in the Supreme Court on September 12, 2014. The Supreme Court issued an order returnable in the

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

Superior Court, requiring the People to show cause why "Petitioner is not entitled to relief under *People v. Chiu* (2014) 59 Cal.4th 155 [(*Chiu*)]."

In response to the order to show cause, the People conceded Besenty was entitled to resentencing under *Chiu*. The trial court reduced Besenty's murder conviction to murder in the second degree, and her attempted murder conviction to "attempted second-degree murder."[2] She was

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[2] Both Besenty and the Attorney General stated in their briefs that the trial court, at resentencing, reduced the charge in count 2 to attempted murder, without premeditation and deliberation. The trial court stated something different from what the parties assert: "As to count 2 for attempted -- it would have to be attempted second-degree murder -- wouldn't it?" The prosecutor replied, "Yes."

Despite the court's statement and prosecutor's acquiescence, there is no crime of attempted second degree murder, because "[a]ttempted murder is not divided into different degrees." (*People v. Favor* (2012) 54 Cal.4th 868, 876 (*Favor*).) The effect of a finding that an attempted murder was willful, deliberate, and premeditated is to increase the punishment from a determinate term of five, seven, or nine years, to an indeterminate term of life in prison. (§ 664, subd. (a).)

Notwithstanding its comment that count 2 was now attempted second-degree murder, the trial court imposed a life sentence, which comports with the jury's finding that the attempted murder was willful, deliberate, and premeditated. As Besenty did not challenge the sentence imposed in count

sentenced to 15 years to life in prison in count 1, plus 25 years to life for the gun enhancement; life in prison in count 2, plus 25 years to life for the gun enhancement; and one year each for two enhancements under section 667.5, subdivision (b).

Besenty appealed following the resentencing, contending: (1) denial of her request for an ability to pay hearing on direct victim restitution at resentencing was error, (2) imposition of a sentence in excess of 70 years to life for aiding and abetting murder under a natural and probable consequences theory of liability constitutes cruel and unusual punishment,[3] and (3) imposition of the 667.5, subdivision (b) enhancement terms was unauthorized. We modified the sentence by striking the section 667.5, subdivision (b) enhancements, but otherwise affirmed.

The Supreme Court granted review but deferred briefing pending consideration and disposition of a related issue in *People v. Mateo*, S232674 (*Mateo*) or further order of the court. (S244887, Dec. 20, 2017.) The issue presented for review in *Mateo* was: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated

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2, we did not further discuss the impact, if any, of the court's statement that count 2 should be treated as a non-existent offense.

[3] Besenty's sentence is, in fact, 67 years to life, but we will assume that she intends her argument that imposition of a 70-years-to-life sentence is cruel and unusual punishment to apply equally to a 67-years-to-life sentence.

murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor*[, *supra*,] 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) [570] U.S. [99 (*Alleyne*)] and *People v. Chiu* (2014) 59 Cal.4th 155?" After Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1(f), p. 6674 (S.B. 1437)) went into effect on January 1, 2019, the Supreme Court transferred *Mateo* back to Division Four of the Court of Appeal, Second Appellate District.[4]

On April 10, 2019, the Supreme Court transferred the instant matter back to this court with directions to vacate our decision and reconsider the cause in light of S.B. 1437 and Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, p. 5106 (S.B. 620)). Besenty and the Attorney General submitted additional supplemental briefs and supplemental response briefs to this court.

We vacate our September 18, 2017 opinion and issue this revised opinion addressing all of Besenty's arguments, including her new arguments relating to S.B. 1437 and S.B. 620. We modify the sentence by striking the two 1-year section 667.5, subdivision (b) enhancements, and remand the cause to the trial court for the limited purpose of determining whether to exercise its discretion to strike the

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[4] Besenty is incorrect in her assertion that *Mateo* has not been decided. The Court of Appeal, Second Appellate District, Division Four issued its unpublished decision on July 9, 2019. (*People v. Mateo* (July 9, 2019, B258333).)

firearm enhancements imposed under section 12022.53, subdivisions (d) and (e)(1). The impact of S.B. 1437 on Besenty's conviction and sentence must be assessed by the trial court in the first instance. We affirm the trial court's judgment in all other respects.

FACTS

On the afternoon of November 25, 2010, Cindy Sanchez drove her boyfriend, Carlos Quintanilla, to his sister Yesenia's apartment.[5] Carlos had been a member of the 18th Street gang for about 10 years. Yesenia claimed the Los Players clique, but she was not actually an 18th street gang member.

Sometime after 10:00 p.m., Sanchez drove the Quintanillas to a location on 79th Street, within 18th Street gang territory. Yesenia told Sanchez "she needed to go talk to somebody, something personal." When they arrived, Yesenia and Carlos exited the car and began yelling for Ada Zeledon, using her 18th Street gang moniker, "Giggles." The Quintanillas disliked Zeledon, because Zeledon made statements that Yesenia had been "prostituting," and making the gang look bad. Zeledon and her friend had also "jumped" the Quintanillas' sister.

Zeledon came outside and argued with Yesenia. Carlos

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[5] Because they share the same last name, we refer to Yesenia and Carlos individually by their first names, and collectively as the Quintanillas.

tried to hit Zeledon with a bottle. Both Carlos and Yesenia challenged Zeledon to fight, but she refused. Zeledon called Mala and Francisco Lozano, who were also 18th Street gang members, for help. The Quintanillas left when Zeledon's mother came outside.

After the Quintanillas got back in the car, Yesenia had Sanchez drive her to a location on 82nd Street, another area Sanchez knew to be claimed by the 18th Street gang. Yesenia wanted to look for Lozano, who Carlos knew to be a "shot caller" for the Los Gangsters clique. Carlos testified that a shot caller has the authority to tell other gang members what to do.

As they neared the location, the Quintanillas jumped out of the moving car. Sanchez saw them heading toward Lozano, who was standing in front of an apartment gate with about 15 other people. Carlos attempted to punch Lozano, but Lozano ducked. Yesenia pepper-sprayed Lozano and yelled profanities at him. Yesenia and Lozano argued loudly about graffiti on a nearby wall. "Bitch, you ain't from my 'hood,'" was written on the wall, and Yesenia's gang moniker "La Crazy" had been crossed out. Yesenia demanded to know why Lozano crossed out her name. He responded that she was not from the 18th Street gang, she needed to stop claiming the gang, and he did not like her.

Besenty walked over a few minutes after Yesenia pepper-sprayed Lozano. She identified herself by the gang moniker "Casper." Carlos knew her to be a shot caller. Besenty and Carlos argued for over an hour. At one point in

the argument Besenty punched Carlos in the face. Yesenia asked Besenty why she hit Carlos. Sanchez got out of the car and warned Besenty never to punch Carlos because it was disrespectful to her and her daughter. Besenty told Carlos that she was "an OG from 18th Street." Yesenia asked her brother if he wanted her to fight Besenty, but he said no. Besenty told Carlos, "Man, you know you talking to the main head?" She took out her cell phone and called Yesenia Escobar, known as "Shorty," and told her to come over. Besenty then gave Lozano "a look." Lozano warned the Quintanillas to "watch tomorrow" several times and said that he was going to get them. The Quintanillas returned to Sanchez's car and drove back to Yesenia's apartment, where they all spent the night.

Zeledon called Lozano the next day. She was upset that the Quintanillas "disrespected" her house and family. Lozano told Zeledon that Yesenia pepper-sprayed him. They both wanted to beat Yesenia up.

Later that night, Zeledon, her friend Mala, and Lozano got into Besenty's car and drove around looking for Yesenia. Besenty drove them to Yesenia's apartment. Escobar also drove to the apartment with Patricia Acosta and Patricia Ortiz. Zeledon, Lozano, and Mala got out of Besenty's car and jumped over the apartment complex gate. Escobar and Acosta followed. Besenty and Ortiz remained in the vehicles.

Sanchez, Yesenia, Carlos, and their children were having dinner when they heard a loud knock. The

Quintanillas asked who was at the door. Someone outside answered, "Hey, what's up? It's me." Carlos opened the door to find Escobar and Acosta outside. The two women entered the apartment and demanded to know why Yesenia pepper-sprayed Lozano.

Escobar left, but returned a few minutes later with Mala. Mala said she came to Yesenia's apartment because she heard that someone was claiming her "hood." She asked Yesenia, "Aren't you from Columbia?" Yesenia said, "No. I'm from Los Players." Carlos also replied that he was from either Lil Cycos or Columbia, two subsets of the 18th Street gang. The women told Yesenia to come outside. She refused, stating that her family was inside. If they wanted to tell her something, they could do it outside.

Mala asked Carlos to go outside, and he agreed. When Carlos stepped out of the apartment, he saw Lozano pulling up the hood of his jacket. Afraid of what Lozano might do, Carlos tried to turn around to go back inside the apartment, but Escobar pepper-sprayed him. Mala grabbed Carlos by the shirt. Mala, Zeledon, and Acosta beat Carlos. Sanchez could hear him struggling and screaming. Carlos tried to go back into the apartment but Zeledon held his shirt collar and punched him. Yesenia tried unsuccessfully to pull Carlos back into her apartment. Lozano pulled out a gun wrapped in a sock and shot Carlos in the head. Carlos collapsed. Acosta, Mala, and Zeledon fled, jumping over the fence.

Sanchez heard Yesenia yelling, "Don't do this. I have kids." Sanchez ran with the children to Yesenia's bedroom,

where she heard a gunshot, but did not close the door. Lozano pointed a sock-covered gun at Yesenia's head. Yesenia screamed, he shot her in the head, and she fell to the floor. Yesenia ran to her bathroom and tried to close the door.

Lozano ran after Yesenia, but then walked into the bedroom where Sanchez was squatting down on a mattress. He aimed for Sanchez's head. Sanchez kicked Lozano and moved to avoid the gun. After a few minutes, Lozano left without explanation. Lozano, Zeledon, and Mala ran to Besenty's car. Besenty quickly drove them back to her house in another neighborhood.

Yesenia died as a result of the gunshot wound to her head a few days later. Carlos survived, but lost hearing in one ear, and suffered lasting speech and memory impairment.

The prosecution's gang expert, Officer Gabriel Gonzales, opined that Lozano was a shot caller for the Los Gangsters clique of the 18th Street gang and also belonged to the Wall Street clique. Officer Gonzales explained that OG's or shot callers have high status within their gang, dictating gang policy and directing the lower-ranking "soldiers" to commit crimes at their discretion. Someone who falsely claimed to be a shot caller would be severely beaten or killed for misrepresenting the gang. He testified that respect is a central concern in gang culture. Gangs respond violently to disrespect because it weakens their reputation, and impedes their ability to control their territory and

commit crimes.

DISCUSSION

Victim Restitution Orders

Article I, section 28, subdivision (b)(13)(A) of the California Constitution vests in "all persons who suffer losses as a result of criminal activity . . . the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." The broad constitutional right to restitution is implemented in section 1202.4, which provides in subdivision (f), that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution." "A defendant's inability to pay shall not be a consideration in determining the amount of a restitution order." (§ 1202.4, subd. (g).)

In her second appeal to this court, Besenty contended that the trial court erred when it denied her request for an ability to pay hearing at resentencing. The trial court ruled

that victim restitution was outside the scope of the Supreme Court's remand. Besenty asserted that although the abstract of judgment from the original sentencing hearing reflected that she was ordered to pay victim restitution, the court only made the order as to Lozano at the hearing, which deprived her of the opportunity to object or be heard at the time of the sentencing court's pronouncement.

The Attorney General conceded that the trial court did not orally order Besenty to pay victim restitution, but contended that she waived the issue by failing to raise it in her first appeal to this court. The Attorney General further argued that the contention failed on the merits because the Supreme Court's limited remand did not encompass victim restitution.

We rejected Besenty's contentions as forfeited, waived, and without merit, and do so again.

Relevant Proceedings

Besenty and Lozano were tried and sentenced together. The prosecution's sentencing memorandum—which the sentencing court stated it had reviewed—recommended that the court order Besenty to pay victim restitution in the amount of $13,689.30 plus 10 percent interest to the State Victim Compensation Board to reimburse the state for monies paid for Yesenia's funeral and burial expenses, and $468.63 plus 10 percent interest to Teresa Ramirez. While pronouncing Lozano's sentence, the court asked the

prosecutor if he "put the number on the restitution order." The prosecutor responded, "Yes." The court then stated: "$13,689.30. And I am signing that. With 10 percent interest payable to the State Victim Compensation Board." The prosecutor then informed the court he was "filling out another restitution amount . . . for Mrs. Ramirez *as to each defendant*" "for $458, I believe."[6] (italics added.) The court responded, "An additional $458 for Mrs. Ramirez. I'm signing that also." Besenty's counsel asked to review the restitution order, as she did not recall receiving it earlier. The prosecutor stated the order had been e-mailed to counsel, but provided her a copy, along with "the paperwork on it." Later, after imposing Besenty's prison terms, the trial court asked: "Is there anything else that I left out? Restitution orders are signed as to Ms. Besenty in the same amounts as to Mr. Lozano." Besenty's counsel did not object to the victim restitution amount, contest Besenty's ability to pay, or request an ability to pay hearing. The restitution orders that the parties viewed and the court executed at the sentencing hearing were consistent with the recommendations in the People's sentencing memorandum. The minute order and abstract of judgment accurately

[6] The amount of victim restitution in the court's order is $458.63, as requested in the sentencing memorandum.

reflected the court's pronouncement.[7]

Besenty did not argue on direct appeal to this court that the trial court failed to conduct a hearing on her ability to pay restitution. We affirmed the judgment. When Besenty subsequently filed unsuccessful petitions for habeas corpus in this court and the trial court, neither petition raised an issue regarding the failure to hold an ability to pay hearing. In response to Besenty's habeas corpus petition in the Supreme Court, the cause was returned to the trial court with an order requiring the People to show cause "why [Besenty] was not entitled to relief under *People v. Chiu* (2014) 59 Cal.4th 155." As set forth above, Besenty was granted relief under *Chiu* and was resentenced.

Defense counsel at resentencing requested an ability to pay hearing. The trial court responded, "Why would I do that? What has changed?" The court denied the request, stating that it was "going to maintain the original restitution [order]" because the issue was not within the scope of the Supreme Court's remand on "the *Chiu* issue" and because there had been no changed circumstances that would justify modifying the victim restitution orders. Counsel then asked if the court would stay the order or take some other action. The court responded that it would not change the order because the victim had a constitutional right to restitution under California law, and Besenty's payments could be

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[7] The abstract of judgment lists a total of $14,147.93 to be paid to the victim and the restitution fund, but does not allocate the amounts to be paid to each.

taken out of her prison earnings or "any money her family puts on the books," which was "a just outcome." Counsel did not assert that Besenty was unable to pay or contest the amount of victim restitution awarded.

Forfeiture

"'In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law.' [Citation.]" (*People v. Trujillo* (2015) 60 Cal.4th 850, 856.) Our Supreme Court has held that "errors [that] are essentially factual, and thus distinct from '"clear and correctable"' legal errors that appellate courts can redress on appeal 'independent of any factual issues presented by the record at sentencing' [citation]" are forfeited on appeal if not raised with the trial court. (*Id.* at pp. 856–857 [failure to conduct inability to pay hearing in context of probation supervision and presentence investigation fees imposed under section 1203.1b]; see also *People v. Aguilar* (2015) 60 Cal.4th 862 [failure to conduct inability to pay hearing in context of probation supervision fees, presentence investigation fees, and appointed trial counsel fees imposed under section 1203.1b].)

The record demonstrates that the sentencing court ordered Besenty to pay victim restitution at the first sentencing hearing, and that Besenty's counsel reviewed the victim restitution orders but did not raise the issue of her ability to pay restitution with the trial court. We see no reason that the law of forfeiture should not apply here, and

Besenty has offered none.

Waiver

Besenty conceded that she did not raise the issue of her ability to pay in her first appeal to this court. To avoid waiver, she phrased her contention as a challenge to the court's denial of her request for an ability to pay hearing at *resentencing* rather than a challenge to the court's failure to conduct an ability to pay hearing at the *original sentencing hearing*. Regardless of how the argument is framed, its fundamental nature remains the same. Besenty seeks the opportunity to attack the validity of the victim restitution order in the absence of a determination that she is able to pay restitution.

Even where "the issue defendant now seeks to raise was technically embraced in [the] remand order," waiver applies if "(1) the issue was ripe for decision by the appellate court at the time of the previous appeal; (2) there has been no significant change in the underlying facts or applicable law; and (3) the defendant has offered no reasonable justification for the delay." (*People v. Senior* (1995) 33 Cal.App.4th 531, 538 (*Senior*).)

Assuming the remand encompassed victim restitution—a point which we doubt—"all of the factual predicates upon which [Besenty's] . . . contention rest[ed] were available at the time of [her] initial appeal. There [was] no apparent justification as to why this issue could not

have been raised the first time [Besenty's] case was before this court. There being no reason why [she] 'should get "two bites at the appellate apple,"' [citation], we deem [Besenty's] claim of error to be waived." (*Senior*, *supra*, 33 Cal.App.4th at p. 538.)

Merits

In addition to stating victim restitution was outside the scope of the remand, the trial court also denied Besenty's request on the merits, finding there were no changed circumstances that would justify modifying the victim restitution orders, the victim had a constitutional right to restitution under California law, and Besenty had the ability to pay restitution from prison earnings and any money given to her by family. The court was not required to consider Besenty's ability to pay the restitution award. To the contrary, "[a] defendant's inability to pay shall not be a consideration in determining the amount of a restitution order." (§ 1202.4, subd. (g); see also *People v. Draut* (1999) 73 Cal.App.4th 577, 582 [court abuses its discretion if it reduces restitution award to victim based on defendant's inability to pay].)

Besenty relied on *People v. Harvest* (2000) 84 Cal.App.4th 641 (*Harvest*) and *People v. Rosas* (2010) 191 Cal.App.4th 107 (*Rosas*), but neither case addressed the question of whether the court may consider a defendant's request for an ability to pay hearing on victim restitution

raised for the first time at resentencing. In *Harvest*, the trial court reserved jurisdiction over the issue of victim restitution at the initial sentencing hearing, and ordered Harvest to pay restitution to members of the victims' families when the defendant was resentenced after his conviction for second degree murder was reduced to voluntary manslaughter. The Court of Appeal held that the trial court did not exceed the scope of its remand—which encompassed "pretty much all of the particulars of sentencing"—"particularly in view of the fact that the trial court had expressly reserved jurisdiction on this issue." (*Harvest*, *supra*, at p. 651.) Unlike the situation in *Harvest*, the trial court here did not reserve jurisdiction over the amount of restitution, and Besenty had an opportunity to challenge the amount of restitution imposed at the original hearing and on direct appeal.

Rosas is also inapposite. In *Rosas*, the court held that issues relating to restitution fines imposed under section 1204.2, subdivision (b), may be within the scope of a remand for resentencing even where the remand does not state so expressly, if the restitution fine is not severable from the judgment. (*Rosas*, *supra*, 191 Cal.App.4th at p. 117.) An order of victim restitution is not analogous to a restitution fine. When imposing a restitution fine greater than the statutory minimum, a court has the discretion to calculate the fine by multiplying the minimum fine by the number of years the defendant has been sentenced to serve, and then multiplying the sum by the number of felony counts of which

the defendant has been convicted. (§ 1204.2, subd. (b)(2).) Under these circumstances, the amount of the fine will be directly related to other aspects of the sentence, and will not be severable. Victim restitution, in contrast, is based "on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) It is calculated independent of the sentence, and must be paid in full. (§ 1202.4, subds. (f) & (g).) The reasoning in *Rosas* has no application here.

Finally, while we are cognizant of the changing landscape with regard to a defendant's right to a hearing to determine his or her ability to pay certain fines, fees, and assessments imposed at sentencing, we do not believe that current precedent dictates a different result. While Besenty's case was pending in the Supreme Court, Division Seven of the Court of Appeal, Second Appellate District, held that a defendant is constitutionally entitled to a hearing on his or her ability to pay court facilities and court operations assessments imposed pursuant to Government Code section 70373 and Penal Code section 1465.8, before they may be imposed. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168–1169 (*Dueñas*).) Division Seven also held that restitution fines paid to the court under section 1202.4, subdivision (b), may imposed at sentencing, but that execution must be stayed pending an ability to pay hearing. (*Id.* at p. 1172.)

Even assuming *Dueñas* was correctly decided,[8] Division Seven specifically noted that the opinion did not address direct victim compensation imposed under section 1202.4, subdivision (f), however. There are significant differences between the purposes behind the assessments and restitution fine at issue in *Dueñas* and direct victim restitution. The assessments raise funds for the court, and the restitution fine paid to the state is intended to be punitive. (*Id*. at p. 1169.) In contrast, direct victim restitution compensates victims for economic losses they have suffered because of the defendant's crime. (*Ibid*.) As the trial court in the instant case stated, victims have a right to restitution under the California constitution. (Cal. Const., art. I, § 28, subd. (b)(13)(A).) In light of the competing constitutional interests of innocent victims, appellate courts have declined to extend its application to victim restitution. (*People v. Evans* (2019) 39 Cal.App.5th 771; *People v. Allen* (Oct. 22, 2019, D074946) ___ Cal.App.5th ___ [2019 WL 5387925].) We share our sister courts' view that *Dueñas* is inapplicable to victim restitution.

Even if *Dueñas* was applicable, there would be no basis for remanding to the trial court for an ability to pay hearing in this case. When denying Besenty's request for an ability

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[8] Division Two of the Court of Appeal, Second Appellate District, recently held that imposition of assessments and a restitution fine did not violate the defendant's due process rights, in contravention of *Dueñas*. (*People v. Hicks* (2019) 40 Cal.App.5th 320.)

to pay hearing, the trial court stated that any wages Besenty earned in prison could be used to pay direct victim restitution, which was akin to a determination that Besenty was able to pay direct victim restitution. In light of Besenty's 67 years-to-life sentence, the trial court's assessment was not unreasonable.

Cruel and Unusual Punishment

Besenty contends that the resentencing court's imposition of a term in excess of 70 years to life constitutes cruel and unusual punishment based on the underlying premise in *Chiu*. We disagree.

The United States and the California Constitutions prohibit cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) A sentence may be unconstitutional if it is grossly disproportionate to the crime committed. (*Graham v. Florida* (2010) 560 U.S. 48, 59–60; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) Whether a sentence constitutes cruel or unusual punishment is a question of law that we review de novo, viewing the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.) A defendant must overcome a "considerable burden" when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

A sentence violates California's prohibition on cruel or unusual punishment if the punishment is so

disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) We apply a three-part test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id*. at p. 425.) Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. (*Id*. at pp. 426–427.) Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. (*Id*. at pp. 427–429.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 (*Martinez*).)

The Eighth Amendment to the federal Constitution "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271.) In determining whether a particular sentence is grossly disproportionate, "we look to the gravity of the offense and the harshness of the penalty" and, as under California law, we may consider an intrajurisdictional and interjurisdictional comparison of punishments. (*Solem v. Helm* (1983) 463 U.S. 277, 290–291.)

Besenty's contention is without merit. Besenty's sentence of 67 years to life in prison reflects an aggregate

sentence. *Chiu* does not address the constitutionality of imposing the same penalty on a direct perpetrator and an aider and abettor found guilty of attempted murder under the natural and probable consequences doctrine, or of imposing a firearm enhancement when the aiding and abetting defendant did not wield the gun. The cases that address these issues do not support Besenty's position. In *Favor*, *supra*, 54 Cal.4th at pp. 879–880, our Supreme Court held that once a jury has found an attempted murder is premeditated, an aider and abettor is no less culpable than the direct perpetrator under the natural and probable consequences doctrine, regardless of the aider and abettor's own mental state.[9] Our colleagues in Division Four have held that it is not cruel or unusual punishment to impose a 25-years-to-life enhancement for use of a firearm upon a non-shooter convicted under the natural and probable consequences theory in a gang-related murder. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 16, overruled on another ground as recognized in *In re Johnson* (2016) 246 Cal.App.4th 1396, 1406.) Besenty cites to no contrary precedent. *Chiu* held the "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) The penalty for second degree murder

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[9] *Chiu* discussed *Favor* at length and did not overrule it. (*Chiu*, *supra*, 59 Cal.4th at pp. 162–163.)

is 15 years to life, which is the sentence Besenty received in count 1. (*Id*. at p. 163; §§ 190, subd. (a), 3046, subd. (a)(2).) The court's reduction of Besenty's sentence for murder by 10 years reflects *Chiu's* holding that she may have been less culpable than Lozano.

Besenty contends her sentence was cruel and unusual because although she was almost 50 years old at the time of the hearing, she had a minimal criminal history composed of drug-related offenses with no serious or violent felonies, and the longest term she served was three years in prison for a probation violation for possession of narcotics. She argues that as a mere driver, her participation in the crimes was minimal, and that her motive and gang connection were "speculative."

Besenty does not compare her sentence to more serious offenses in California or to punishment imposed for the same offenses in other jurisdictions. We take this "as a concession that [her] sentence withstands a constitutional challenge on either basis." (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.) Besenty also significantly minimizes her role in the crimes. Besenty was with Lozano the night before the shootings. The two of them confronted the Quintanillas. She engaged in a verbal altercation with Carlos for about an hour, punching him in the face at one point. Besenty announced she was "an OG from 18th Street," and threatened Carlos that she was "the main head." She then gave her fellow shot caller Lozano a "look," and he immediately threatened the Quintanillas that he was going

to get them and to "watch tomorrow." The next day, Besenty drove Zeledon—who had purportedly been "disrespected"—and Lozano—who was armed and ultimately shot both victims—to Yesenia's apartment. She waited for the attackers and drove one of the getaway vehicles to her home, where they all congregated afterwards. Besenty's self-proclaimed status as "the main head" and "an OG from 18th Street" strongly suggest that she was integrally involved in the attack. The prosecution's gang expert testified that shot callers or OG's dictate gang policy, direct lower-ranking gang members in criminal activity, and react violently to perceived slights in order to protect the gang's reputation. Zeledon stated that she felt disrespected by the scene with the Quintanillas at her house, and Lozano was unquestionably disrespected when Yesenia pepper-sprayed him in the face. It can be reasonably inferred that, as one of the two shot callers in the group, Besenty had a role in orchestrating the shootings in retaliation to these slights to her gang. She facilitated the crimes by driving gang members to and from Yesenia's apartment and providing her cohorts sanctuary at her home, which was removed from the scene. Her participation was far from nominal.

Besenty's insistence that her gang affiliation and motive were speculative is contrary to the evidence and inconsistent with the jury's finding that she acted for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members.

Although she did not have a record of serious or violent criminal activity, Besenty had committed drug-related offenses, one of which resulted in a three-year prison term in conjunction with a parole violation. Her criminal history was not negligible, but even if it could be characterized in that manner, the lack of a significant prior criminal record is not determinative, particularly in light of the heinous nature of the crimes. (*Martinez*, *supra*, 76 Cal.App.4th at pp. 496–497; *People v. Crooks* (1997) 55 Cal.App.4th 797, 806–807.)

The violent crimes in this case were severe in the extreme. Five gang members attacked the Quintanillas. Carlos was badly beaten and pepper-sprayed. Both siblings were shot in the head, resulting in Yesenia's death and Carlos's lasting impairments. Sanchez barely escaped being shot. All of this took place in front of Sanchez and Yesenia's children, who cowered in the bedroom with Sanchez as Yesenia was shot. Both the fight the night before and the shootings were precipitated by a disagreement over graffiti and a relatively minor physical altercation. This violent and deadly reaction to comparatively minimal provocation demonstrates the serious threat that Besenty and her companions pose to society. In light of these facts, we cannot conclude that Besenty's sentence is disproportional to her crimes under either the state or federal standard.

Section 667.5 Enhancements

We agree with the parties that the two 1-year prior

prison term enhancements (§ 667.5, subd. (b)) were unauthorized. Section 667.5 enhancements may not be imposed "unless they are charged and admitted or found true . . . ." (§ 667.5, subd. (d).) No prior prison term enhancements were charged, admitted, or found true as to Besenty. We order the section 667.5, subdivision (b) enhancements stricken from the abstract of judgment. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13 [unauthorized sentence may be corrected on appeal].)

Senate Bill No. 1437

S.B. 1437 retroactively amended the definition of "murder" to preclude a jury from "imput[ing]" "malice" "based solely on [a defendant's] participation in a crime." (§ 188, subd. (a)(3).) Our Legislature's purpose was to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f), p. 6674.)

Besenty asks us to vacate her second degree murder and attempted premeditated murder convictions, which rest on a natural and probable consequences theory of aiding and abetting. More specifically, she argues that (1) this court is empowered to vacate her convictions because S.B. 1437's

ameliorative provisions are retroactive to nonfinal convictions under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), (2) S.B. 1437 should be interpreted to reach attempted murder as well as second degree murder, (3) equal protection requires that her premeditated attempted murder conviction be vacated, and (4) this court must evaluate whether the evidence is sufficient to support the findings that she was a "major participant" who "acted with reckless indifference to human life" such that her convictions may be sustained under S.B. 1437 regardless of whether we remand the matter to the trial court.

We adhere to our holding in *People v. Martinez* (2019) 31 Cal.App.5th 719, 729, that S.B. 1437's enactment of the petitioning procedure in section 1170.95 dictates that the changes worked by the legislation do not apply retroactively on direct appeal. Besenty is entitled to pursue the procedure set forth in section 1170.95, but she is not entitled to S.B. 1437 relief without doing so. Should Besenty choose to pursue such relief, the trial court may decide whether S.B. 1437 applies to attempted murder convictions either by statute or on equal protection grounds in the first instance.

We reject Besenty's argument that this court "can and should render a legal opinion and/or analysis regarding the sufficiency of the evidence to sustain appellant's murder conviction under the modified Penal Code statutes,"~(SRB 6)~ despite our determination that remand is appropriate. *In re Taylor* (2019) 34 Cal.App.5th 543 (*Taylor*), on which Besenty relies, is inapposite. In *Taylor*, the defendant

argued on appeal that there was insufficient evidence to support the jury's true finding that he "aided and abetted 'as a major participant' and 'with reckless indifference to human life,' a special circumstance requiring a sentence of life in prison without the possibility of parole . . . ." (*Id*. at p. 546.) As a result of the appellate court's conclusion that the evidence was insufficient to support the special circumstance, it remanded to the trial court to determine whether the defendant's conviction should be vacated under S.B. 1437 in the first instance. In this case, Besenty did not challenge the sufficiency of the evidence underlying her conviction on appeal, so the issue is not before us.

Senate Bill No. 620

Besenty contends, and the Attorney General concedes, that the trial court now has discretion under recently enacted S.B. 620 to strike the two 25-years-to-life section 12022.53, subdivision (d) and (e)(1) firearm enhancements in counts 1 and 2. Besenty requests that the case be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, because the court lacked the power to do so at the time of sentencing.

We agree. Although the trial court was required to impose the firearm enhancements at the time Besenty was convicted, while this appeal has been pending the Governor signed S.B. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm

enhancement as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2, p. 5106.) We conclude that the court should be afforded the discretion to strike the section 12022.53, subdivisions (d) and (e)(1) firearm use allegations under S.B. 620 in the first instance, and we remand for that purpose.

DISPOSITION

We strike the two 1-year terms imposed under section 667.5, subdivision (b), and remand the matter to permit the trial court the option, if it so chooses, to exercise its discretion to strike Besenty's firearm enhancements within the confines of section 1385, pursuant to S.B. 620. In all other respects the judgment is affirmed, but without prejudice to Besenty filing a section 1170.95 petition in the trial court.[10] The clerk of the superior court is ordered to issue an amended abstract of judgment.

MOOR, J.

We concur:

BAKER Acting P. J.

KIM, J.

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[10] The trial court may, in the first instance, decide whether S.B. 1437 applies to attempted murder convictions and whether Besenty otherwise qualifies for relief. We express no opinion on the merits of such a petition.